No. 12761

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JACK BORCICH, ANDREW VILICICH and BORTUL ZANKICH, Co-Owners of the Oil Screw MARSHA ANN,

Appellants,

vs.

JOSEPH ANCICH, JOHN KAIZA, ANTON BOGDANOVICH, PETER SVORINICH, MARTIN MISKULIAN, RAY ZUKOWSKI, WILLIAM T. DECKER, GEORGE KORGAN, SAM BILAS, W. H. HOOPES, NICK MILOSEVICH, GEORGE KORGAN and SAM BILAS,

Appellees.

APPELLANTS' OPENING BRIEF.

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STATEMENT OF JURISDICTION.

Appellees filed their respective libel and intervening libels *in Rem* and *in Personam* for Wages and Maintenance and for Collision Damages [A. pp. 3, 11 and 35]. Appellants filed their answer to the libel and intervening libels [A. pp. 20-27]. In the libels [A. p. 4] and in the intervening libels [A. pp. 13-36], it was alleged that a collision occurred on the high seas between the Oil Screw BEAR and the Oil Screw MARSHA ANN. In their answer, appellants admitted that a collision did occur between the said vessels [A. p. 21]. Appellees alleged that all of the premises in

the said libel were in the Admiralty and Maritime Jurisdiction of the United States and of the District Court [A. pp. 6-16-40], and in their answer thereto, appellants admitted the said allegations [A. pp. 25-32].

Jurisdiction of the District Court is based upon the allegations in said libel, intervening libels and answers thereto hereinabove referred to, and upon the grant of admiralty jurisdiction contained in the Constitution of the United States, Article III, Section 2, and upon Title 28, United States Code, Section 1333, which provides for original jurisdiction of any civil cause of admiralty or maritime jurisdiction in the District Courts of the United States.

The final decree in the above entitled case was entered on September 14, 1950 [A. pp. 69-71]. This appeal is from that final decree.

The jurisdiction of this Court is based on Title 28 United States Code, Section 1292, which provides that the Courts of Appeals shall have jurisdiction of all appeals from final decisions of the District Courts of the United States and upon Assignment of Errors duly filed [A. p. 77], a Petition for Appeal duly allowed and filed [A. p. 72], Citation on Appeal [A. p. 84] and Notice of Appeal served and filed [A. p. 86].

STATEMENT OF THE CASE.

Version of the Appellees.

In their respective libels and intervening libels [A. pp. 4, 13 and 37], the appellees contended that the collision in question occurred substantially as follows:

On or about November 30, 1948, at or about 11:30 o'clock A. M. (Pacific Daylight Time), the BEAR was proceeding at a speed of about 1½ miles per hour in a generally northwesterly direction about 2½ miles southeast of the Los Angeles Harbor Breakwater Light. A heavy fog was laying off the coast in this vicinity. At the time of the collision and for approximately one hour prior thereto, the BEAR had been sounding fog signals in compliance with the Rules of the Road. While it was proceeding through the fog, the BEAR alternately stopped and proceeded at a speed of approximately 1½ miles per hour. Suddenly the MARSHA ANN appeared broad on the starboard beam of the BEAR at a distance of approximately 40 feet and traveling at an excessive speed. Before any effort could be taken to avert the collision the MARSHA ANN struck the BEAR at almost a right angle on the starboard side of the BEAR just aft the deck house. At this time the BEAR was purportedly dead in the water.

Version of Appellants.

In their answers to the respective libels and intervening libels [A. pp. 21 and 29] appellants contended that the collision occurred substantially as follows:

On or about the 30th day of November, 1948, between 11:00 and 11:30 o'clock A. M., the MARSHA ANN was proceeding outward through the breakwater of the San Pedro Bay in a heavy fog; visibility was limited to approxi-

mately 10 to 15 feet; the speed of the MARSHA ANN was not more than two knots; fog signals as prescribed by the Rules of the Road were being given. When the MARSHA ANN was about 200 yards outside of the said breakwater and southeast of the Los Angeles Harbor Light its radar operator notified Captain Jack Borcich that the radar screen indicated that three vessels, one to the starboard and two to the port, were heading for the entrance to the breakwater. Captain Borcich immediately disengaged the engine to let these boats enter the breakwater safely.

The MARSHA ANN had been stopped for about four minutes with no way upon her when the lookout in the bow of the MARSHA ANN called attention to a vessel (the BEAR) approximately 20 feet off the port bow of the MARSHA ANN. Captain Borcich immediately sounded the danger signals as required by the Rules of the Road. The BEAR was moving at a speed greatly in excess of moderate, which would have scarcely cleared the bow of the MARSHA ANN, when suddenly the BEAR made a turn hard to port swinging its stern toward the MARSHA ANN in such a manner as to cause the starboard beam of the BEAR to strike the stem of the MARSHA ANN.

Summary of Testimony of Appellees.

The BEAR is a wooden fishing vessel constructed in 1917 [A. p. 125]. It has an overall length of 65 feet [A. p. 103] and is owned by Sam Bilas and George Korgan [A. pp. 11 and 101]. On November 30, 1948, the BEAR, with a cargo of sardines aboard, left Oceanside between 5:00 and 5:30 A. M. to return to San Pedro [A. p. 102]. The distance between the point of departure of the BEAR and San Pedro was approximately 55 miles [A. p. 192]. This distance had to be negotiated by the BEAR before noon or approximately 11:50 A. M. [A. p. 206].

The top speed of the BEAR is about 8½ knots [A. p. 192] and before the BEAR arrived in the vicinity of Newport it had been traveling at top speed [A. p. 147]. When the BEAR arrived in the vicinity of Newport it ran into fog for the first time that morning [A. p. 147]. The visibility was fair until the BEAR arrived at Seal Beach where the fog commenced to get very heavy [A. p. 148]. It was 10:45 A. M. when the BEAR encountered its first fog above mentioned [A. p. 222].

The BEAR was being navigated through this fog without any one designated as a lookout stationed in the bow of the BEAR [A. pp. 126 and 158]. Captain Milosevich and the cook, Mr. Ancich, were in the pilot house of the BEAR [A. p. 146] with Mr. Milosevich at the wheel [A. p. 146]. There were three other men on the top side of the BEAR. Mr. Bogdanovitch testified that he posted himself "under the green light" [A. p. 286] and testified that "part of it was my own will to go up there on a lookout" [A. p. 285]. Mr. Hoopes, the engineer of the BEAR [A. p. 136] was also standing "under the green side lights" [A. p. 136]. He was not acting as a lookout but was merely "looking out the same as anybody else would" [A. p. 136].

Mr. Miskulian was present in the pilot house and his duties immediately prior to the collision were to blow the boat's whistle when he was instructed so to do by the Captain [A. pp. 214, 222, 223, 231]. The signals given by Mr. Miskulian were not in any definite pattern. For example, Mr. Kaiza, one of the crew members of the BEAR, testified—

> "When we heard, long distance from us, long whistle, long blast, then we give long blast: When we heard smaller, we give smaller." [A. p. 269.]

On the other hand, Mr. Milosevich, the Captain, testified that he told Mr. Miskulian—"If he didn't hear no boat to give it two or three a minute in that fog and slow." [A. pp. 209, 210.] Mr. Milosevich further testified that Mr. Miskulian was to blow the whistle every half minute [A. p. 194], and if there were a lot of boats, three or four times a minute [A. p. 194].

Mr. Hoopes testified that the BEAR was continuously sounding whistles and by that he meant "The answering whistles on the way through the fog and blowing their own whistles . . . I should say several times a minutes to three or four times a minute." [A. p. 138.]

Mr. Milosevich testified that upon sighting the MARSH ANN the BEAR continued to blow the same whistles "all the time, three or four times a minute." [A. p. 196.] Immediately prior thereto, however, he testified that the BEAR was blowing the whistle "one every two or three seconds." [A. p. 195.]

The BEAR reduced its speed to about four to four and a half miles per hour between 10:30 A. M. and 11:00 A. M. [A. p. 168], and prior to the collision had been moving at about a mile to a mile and a half per hour for about 10 to 15 minutes [A. p. 149]. The visibility immediately prior to the collision was from 50 to 60 feet [A. p. 137]. The MARSHA ANN was first sighted between 50 and 60 feet off the starboard beam of the BEAR [A. p. 137]. Messrs. Milosevich, Ancich and Bogdanovich testified that they saw the bow and pilothouse of the MARSHA ANN at one and the same time [A. pp. 232, 283, 298]. Indeed, Mr. Bogdanovich testified that he could even see the name on the bow of the MARSHA ANN [A. p. 298].

The speed of the MARSHA ANN was estimated by the crew of the BEAR to be anywhere from two to six miles per

hour [A. pp. 139, 176]. The MARSHA ANN was headed "right straight" for the green light of the BEAR [A. p. 130] and it purportedly struck the BEAR from eight to ten feet aft of the beam [A. p. 141] and the blow was struck "straight broadside." [A. p. 288.]

Ten seconds elapsed from the time that the MARSHA ANN was first sighted and the time of impact [A. p. 151]. In that interval the BEAR had moved from eight to ten feet [A. p. 139]. The time of the collision was 11:30 A. M. [A. p. 101], approximately 2½ miles from San Pedro [A. p. 192].

It cannot be determined from the testimony of the appellees whether the collision could have been avoided at the time the MARSHA ANN was first sighted by the BEAR. The testimony of Mr. Milosevich in this regard is as follows:

> "Q. When you first sighted the Marsha Ann you realized at that time that an accident or collision was likely to happen, didn't you? [115] A. No, I didn't expect that accident going to happen." [A. p. 196.]
> . . . "Didn't you think, Nick, when you saw the Marsha Ann there for the first time that you were going to avoid a collision? A. No, I couldn't avoid it nohow.
>
> Q. I mean, but you thought for just a split second that you were going to avoid it, didn't you? A. I didn't. I couldn't say that." [A. p. 201.]

After striking the BEAR the MARSHA ANN pushed the BEAR sideways for approximately four minutes [A. pp. 273, 109, 127, 173]. Mr. Korgan testified that the vessels did not become separated for about ten minutes and at that time they "just drifted apart." [A. p. 131.] Mr. Hoopes testified "they never did drift apart." [A. p. 153.]

Mr. Hoopes testified that after the impact the MARSHA ANN "was gradually moving back until it was portside to the BEAR" [A. p. 153], and Mr. Kaiza testified that "at the end of the sideward pushing of the BEAR, the two boats ended up side by side, with the bow of the MARSHA ANN back and aft of the bow of the BEAR." [A. pp. 271, 272.] The appellees were unable to testify whether the MARSHA ANN was, or was not, sounding signals at the time of the collision [A. p. 138].

Mr. Louis Sims, a marine surveyor of wooden boats, with about three years' experience [A. p. 334], testified that the BEAR was damaged in substantially the following particulars: The bulwarks of the starboard side had been broken inward and the planking cracked in the bulwarks. The main guard had been crushed and the two main deck beams had the ends crushed and the beams were split. The vessel's main decking from starboard to port was wracked and set to port [A. p. 320]. Three hanging knees on the portside had been strained and there were openings on the starboard side of the toes and the feet of the frame with openings at the knees on the portside in the heel of the knees. The hatch coaming was strained [A. p. 321]. The frames along both the starboard and port sides were broken on a line with the lower heel of the hanging knees. Four strakes of ceiling wood on the starboard side of the fish hold were broken and certain frames on the portside were broken on a line with the bottom ends of the hanging knees. The planking had been popped from its fastenings. The fastenings parted and the seams opened. The seams on both the port and starboard sides were opened at the turn of the bilge [A. p. 322]. The fore and aft ends of both the port and starboard garboard strakes had been strained and were standing out. The engine, the engine foundations and the engine fastenings

had been pulled and the engine was loose. The planking on the entire hull "had been shook up," with the "fastening started and the caulking slacked," the engine was out of alignment [A. p. 323]. He testified that the price of such repairs was $17,770.67 [A. p. 327].

Summary of Testimony of Appellants.

The MARSHA ANN is a vessel of approximately 97 feet in length. On November 30, 1948, the MARSHA ANN was proceeding from Fish Harbor destined for fishing grounds on the high seas [A. p. 375]. She had 5,000 gallons of fuel aboard and 100 tons of water for ballast. Thus equipped she weighed around 360 to 370 tons [A. pp. 374, 375]. Her bow was approximately 18 feet from the water line. Captain Borcich and Messrs. Tudor and Zitko were on the bridge [A. p. 361]. Captain Borcich was at the wheel. The wheel is located outside and just forward of the pilothouse [A. p. 419]. Bortul Zankich was the Chief Engineer, navigator and radar operator [A. p. 421].

Steve Kuljis was stationed in the bow of the MARSHA ANN as a lookout [A. pp. 363, 385, 428, 509].

As the MARSHA ANN traveled through the harbor it began to meet fog in the middle of the bay [A. p. 389]. The visibility was limited. Captain Borcich immediately ordered Mr. Zankich to turn on the radar set [A. p. 375]. Thereafter Mr. Zankich remained in the radar room [A. pp. 385, 436] reading the radar screen [A. p. 424] and giving continual radar reports to Captain Borcich [A. p. 429]. When the MARSHA ANN was abeam

of the breakwater, Mr. Zankich told Captain Borcich that there was one boat between one and two points off the starboard bow and two boats 45 degrees to port [A. p. 425]; one of the boats to port was erratic in its direction, and upon being notified of this by Mr. Zankich, Captain Borcich immediately stopped the engine [A. pp. 426 and 428]. The radar operator then continued to observe the progress of these three boats until they passed off the radar screen into the 'blind spot" [A. p. 443]. The blind spot herein referred to is that area within 200 yards of the MARSHA ANN since the radar set would not pick up any object within that distance [A. p. 422].

The engine of the MARSHA ANN had been stopped for approximately five or six minutes [A. pp. 362, 378, 426] and she was drifting [A. p. 382]. While the MARSHA ANN was so drifting, the visibility was about 25 feet [A. p. 510]. The running lights and the mast light of the MARSHA ANN were lighted [A. pp. 364, 384]. Captain Borcich was sounding two blasts on his fog whistle. Each blast was from four to six seconds duration and were separated by about one second. These blasts were repeated at intervals of not more than a minute and a half [A. pp. 378, 426, 427]. After the MARSHA ANN had been drifting for about five minutes, the BEAR was sighted approximately 20 feet off the port bow of the MARSHA ANN [A. pp. 361, 362, 379]. The BEAR was coming toward the MARSHA ANN at a speed of approximately seven miles per hour [A. p. 383]. Immediately upon sighting the BEAR, Captain Borcich gave the danger signal of four blasts on his whistle [A. pp. 380 and 430]. When the BEAR was

approximately 15 feet away from the bow of the MARSHA ANN it turned hard to port [A. pp. 363, 372, 382] and commenced swinging her stern into the stem of the MARSHA ANN [A. pp. 428 and 511]. The collision occurred at 11:00 o'clock in the morning according to the clock aboard the MARSHA ANN [A. p. 421] and approximately 600 feet southeast of the lighthouse [A. pp. 375, 385].

The impact of the starboard beam of the BEAR as it swung its stern into the stem of the MARSHA ANN was not very severe since it moved Mr. Kuljis, the lookout stationed in the bow of the MARSHA ANN only two or three feet [A. p. 515] and indeed did not even spill the food that was on the stove in the galley of the MARSHA ANN [A. p. 504]. The MARSHA ANN did not push the BEAR sideways [A. p. 365] and immediately after the impact the BEAR continued its turn hard to port and then reversed and slid back alongside the MARSHA ANN [A. pp. 411, 511]. The MARSHA ANN then threw lines to the BEAR and secured her alongside and brought her into the harbor [A. pp. 128, 129].

Mr. Williams, a marine surveyor with 35 years experience, testified on behalf of the appellants concerning the damage occasioned the BEAR by the collision [A. p. 446]. There was no question as to the qualifications of Mr. Williams since one of the Proctors for the appellees was willing to stipulate to same and indeed at one point notified the Court that he did not believe further foundation was necessary for certain questions since he was familiar with Mr. Williams' reputation [A. p. 449]. The

damage in question was to the starboard side of the BEAR just aft and adjacent to the rigging. The planks in that area immediately below the guard were damaged and two planks on the portside were loosened at the seams. The knees in the hold showed signs of movement and some of the frames in that area were broken. The rail cap was broken. The waterway plank or covering board was crushed and some of the deck seams in that immediate area were loosened [A. pp. 455-6 and 536-7].

Mr. Williams estimated the amount of damage to be about $6500.00 and Mr. DeFever, with whom he was associated, estimated the damage to be approximately $5900.00 [A. pp. 456 and 539]. The time necessary to make the required repairs to the BEAR was from 20 to 25 days [A. pp. 459 and 540].

In examining the BEAR after the collision both Mr. Williams and Mr. DeFever found that the BEAR was rotten in many areas [A. pp. 448, 451 and 539]. Many of the breaks, particularly those in the frames on the portside and those breaks in the bilge area, were old as evidenced by the presence of dirt and filth that was lodged in the break and by the discoloration of the break [A. pp. 453, 488-9 and 537]. To repair the damage occasioned by the collision it was necessary only to repair the guard rail and bulwark rail, replace a section of the covering board, recaulk the deck in that area, recaulk the loosened planks on the portside, repair slight damages to the rigging, check and realign the engine shafting, and paint the vessel in the damaged areas [A. p. 538].

It was not necessary to refasten or recaulk all the planks nor was it necessary to remove some of the sheathing on the outside of the planking in the stern or work on the seine table. It was not necessary to stiffen the engine beds nor paint the superstructure and other portions of the topside of the vessel which were not damaged [A. p. 538].

SPECIFICATIONS OF ASSIGNED ERRORS RELIED UPON BY APPELLANT.

Appellants rely on Assignments of Errors numbered First [A. p. 78]; Third [A. p. 80]; Fourth, Sixth (1), (2), (3), (4), (5), (6), (7) [A. pp. 80, 81]; Seventh; Eighth (1), (2) [A. pp. 81, 82]; Ninth (2), (3), (4), (5) [A. p. 82]; Tenth; Eleventh (3), (4), (6), (7), (8) [A. pp. 82, 83]; Twelfth (2) [A. p. 83].

Because of the length of the aforementioned Assignments of Errors, they are printed herein as an Appendix to this Brief.

In essence these Assignments of Errors relied upon by appellants relate to the findings of the Court to the effect that the MARSHA ANN was solely at fault for the collision in question and the failure of the Court to find that the collision was caused by the fault of the BEAR and its crew. Appellants further contend that it was error for the Court to order, adjudge and decree that the respective members of the crew of the BEAR recover damages from appellants. It is also the contention of the appellants that the damages awarded to the owners of the BEAR for the injury to the BEAR and for detention were excessive.

SUMMARY OF ARGUMENT.

It is the position of the appellants that the MARSHA ANN was not at fault for the collision and they strenuously urge that the collision was caused by the fault of the BEAR. As will be shown hereinbelow, the BEAR had come to within two or two and a half miles of San Pedro from Ocean-side in a little more than five and a half hours. To travel all this distance in such a short time, the BEAR had to travel at top speed all the way. If it had stopped and "felt its way along," it would have been well into the afternoon before it reached the point at which the collision occurred. This excessive speed of the BEAR is sufficient to stamp it as the offending vessel in this collision.

The testimony of the crew of the BEAR was unanimous and clear to the effect that various indiscriminately blown signals were being sounded by the BEAR prior to and at the time of the collision. Indeed even the Trial Court commented that the BEAR was attempting to answer the whistles of the other vessels. Too clear for extended discussion is the rule that in times of limited visibility and especially fog a vessel must sound fog signals in compliance with the Rules of the Road at Sea. Again it must be said that this fault alone would be sufficient to cause the liability for this collision to be upon the BEAR.

The Starboard Hand Rule (Article L9 of the International Rules) specifically provides that when two steam vessels are crossing so as to involve the risk of collision the vessel which has the other on her starboard side shall keep out of the way of the other. By the testimony of the crew of the BEAR the MARSHA ANN was off the starboard side of the BEAR. Therefore it is clear that the burden was upon the BEAR to keep out of the way of the MARSHA ANN. The fact that she did not so do was an-

other fault which contributed to the occurrence of the collision.

The testimony of the BEAR is clear to the effect that there was no one stationed in the bow of the BEAR as a lookout. It is elementary that to avoid danger it is necessary to first apprehend that danger exists. The fact that the visibility according to the crew of the BEAR was limited to from 50 to 60 feet made it even more imperative that a lookout be stationed as far forward in the vessel as possible and as close to the water line as possible. Again it must be said that this was a grievous fault on the part of the BEAR.

It is undisputed that the MARSHA ANN was sounding the proper fog signals at the time of the collision. It is further demonstrated hereinbelow that immediately prior to the collision the MARSHA ANN was forward of the beam of the BEAR. It was the duty, therefore, of the BEAR to stop her engines and navigate with caution when hearing these fog signals, but as already indicated above the BEAR was proceeding at such an excessive rate of speed that it could not reasonably be said that it was navigating with caution commensurate with the existing circumstances. Surely this must be assigned as a further fault on the part of the BEAR.

The amount of damages awarded by the Court to the owners of the BEAR for injury to the BEAR and for loss of use of the BEAR were clearly excessive. There is no conflict in the testimony to the effect that the BEAR was an old, wooden boat built as early as 1917 and throughout the years it has been exposed to the elements and to the wear and tear that of necessity accompanies the use of a vessel for fishing purposes. The evidence showed that many of the wounds, injuries and breaks in the BEAR were old and

of long standing and that they were not occasioned by this collision and should not have been charged as costs for repairs necessitated because of this collision.

It follows from this that the amount of time allowed by the Court for repairs was excessive in that it included time necessary to make the repairs which were not occasioned by the collision.

The libel of the fishermen appellees did not state facts sufficient to constitute a claim against these appellants because the damages prayed for were too remote. In effect they were attempting to hold the appellants liable for the expected fruits of their contract with the owners of the BEAR. However, the law is clear that a third person who negligently interferes with the performance of a contract between two other persons is not liable for damages flowing therefrom in the absence of malice or intent.

At the conclusion of the trial the Court stated that it believed the engines of the MARSHA ANN were stopped at the time of the collision. The evidence of the appellants shows that they had been so stopped for approximately five minutes and that the MARSHA ANN could not have been traveling at an excessive speed. Likewise the evidence shows that the proper fog signals were being sounded by the MARSHA ANN and that she had a lookout stationed in her bow. This testimony is undisputed. In view of this, it is the contention of the appellants that the MARSHA ANN was proceeding cautiously and carefully with due regard of all of the existing circumstances and that it was not at fault in any particular in respect to this collision.

ARGUMENT.

I.

The Court Erred When It Found:

"Sixth: (2) That at the time of the said collision and for more than an hour preceding the same the Bear was sounding fog signals in compliance with the applicable rules of the road.

"Ninth: (2) That the Bear was manned by a competent crew.

"Ninth: (3) That the Bear was well and carefully navigated."

The testimony of the appellees was to the effect that the BEAR was under way with way upon her [A. p. 149]. The sound signals required under the circumstances are prescribed by 33 U. S. C. A. 91(a) as follows:

> "A steam vessel having way upon her shall sound, at intervals of not more than two minutes, a prolonged blast." (Italics added.)

It is undisputed that the appellees were not sounding the proper signals in accordance with this rule and in fact were not sounding any signals even remotely similar to those required by this rule. Reference need only be made to the testimony of the appellees for proof of this. For example, Mr. Miskulian, who was in charge of the whistle aboard the BEAR, testified:

> "Q. Did you operate the boat's whistle? A. Yes. I pulled when he told me.
>
> Q. When who told you? A. Nick Milosevich is who." [A. p. 214.]

. . . . . .

"Q. All right. Did you blow the whistle when Nick told you to or did you blow it on your own volition? A. When he told me. When he told me, then I pulled.

Q. In other words, if he would say to pull it, then you would pull it, and if he did not say to pull it, you would not? A. Yes." [A. p. 222.]

Mr. Milosevich substantiated the testimony of Mr. Miskulian to this effect [A. p. 222]. But when did Mr. Milosevich tell Mr. Miskulian to blow the whistle, or to put it otherwise, what kind of signals was Mr. Miskulian told to give? Mr. Milosevich testified to various signals at various times. For example, at one time he said that he—

"told him (Miskulian) if he didn't hear no boat to give it two or three a minute in that fog and slow." [A. pp. 209-210.]

Earlier Mr. Milosevich testified that:

"We was blowing four or five times a minute." [A. p. 175.]

Then again Mr. Milosevich testified:

"We was blowing one every two or three seconds." [A. p. 195.]

Mr. Miskulian testified at one time that he would blow the whistle "five or six times in one minute." [A. p. 224.]

What is the truth about the "whistle blowing" of the BEAR from this maze of contradictory and inconsistent testimony on the part of the crew of the BEAR? Mr. Kaiza testified:

"The Witness: When we heard, long distance from us, long whistle, long blast, then we give long blast: When we heard smaller, we give smaller." [A. p. 260.]

In brief, the BEAR not only failed to sound proper fog signals but in fact even failed to sound any consistent signals. It merely answered the whistles of other vessels. The Trial Court expressed this fact as follows:

> "I am impressed by the witness who said that as the Bear proceeded along it tried to answer whistle for whistle. That is, if it heard a whistle out here some distance that gave a sort of a long toot, it answered with the same kind of a whistle, indicating that it heard that fellow. If someone over here pulled a short one, the BEAR answered with a short one." [A. p. 674.]

Can it be said that when a vessel answers whistle for whistle, whether it be a prolonged whistle or a short whistle, that it is complying with the International Rules of the Road at Sea, which requires specific signals for certain given situations? To state the question is to answer it, for certainly nothing could be more confusing to the traffic on the high seas than to hear indiscriminately sounding long and short blasts without any regard to the meaning thereof.

The provisions of 33 U. S. C. A. 91 are mandatory, not discretionary, and their "imperative" nature (*Merchants & Miners' Transp. Co. v. Hopkins,* 108 Fed. 890, 894) imposes upon the master of a vessel the grave obligation to sound the prescribed fog signals at the risk of being grossly at fault for failing to so do. The importance of the provisions of this section are illustrated by the following cases:

In the case of *The Benjamin A. Van Brunt,* 98 Fed. 131, 38 C. C. A. 668, the Court of Appeals of the First Circuit had before it the case of a collision between the Pilgrim, a passenger steamer, and the schooner Van Brunt while the latter was at anchor. The Van Brunt was lying

at anchor in the channel in front of the city of Fall River and had been so anchored for some days. The Pilgrim knew she was anchored there. The fog was dense. The Van Brunt was not sounding her fog bell, and the Pilgrim hearing no sound proceeded in the fog and ran into the Van Brunt. It was contended that under the circumstances the Pilgrim should have stopped and that her lookout service was not sufficient. The Court overruled both these contentions and found that the collision was caused by the failure of the Van Brunt to ring her fog bell, that the Pilgrim was not in fault, and approved the decree of the District Court in awarding all the damages against the Van Brunt.

And in *The Noe G,* 235 Fed. 119, which was a case arising out of a collision between a vessel named the Noe G and the L'Etruria, the Circuit Court of Appeals of the Ninth Circuit affirmed the District Court, which had found that both vessels were at fault in the said collision. The Court found that the L'Etruria sighted the Noe G when the vessels were approximately 48 to 50 feet apart; that the Noe G did not sight the L'Etruria until said vessels were from 10 to 15 feet apart and that had the lookout on the Noe G been properly stationed he could have seen the L'Etruria when she was at least 40 to 50 feet distant; that the L'Etruria had not, prior to the collision, been blowing her fog horn. As a result of these findings the Court overruled the contention that the failure of the Noe G to have a lookout properly stationed was the sole fault of the collision and ruled that even though the Noe G should have sighted the L'Etruria at a safer distance, the L'Etruria was herself in fault for failing to sound the proper fog signals.

In the *Rosaleen,* 214 Fed. 252, a ferryboat was held to be in fault for a collision in a fog with a scow anchored

at a place in the Hudson River, where she had been for at least two years. It was manifest from the evidence introduced at the trial of the cause that the ferryboat was moving at a speed greatly in excess of moderate in view of the circumstances then existing. In that she was unable to stop in her share of the distance between herself and the scow, after sighting the scow. Despite this flagrant fault, the Court refused to hold that the ferryboat was solely at fault for the reason that it was shown that the scow had not been giving required fog signals. In its decision, the Court said:

> "The Rosaleen (the scow) *was undoubtedly* in fault for not giving fog signals, and *if she had been a new comer on the field of operations, of which the Albany had no notice, we should be inclined to hold her solely in fault for the collision.* But her presence was well-known to the Albany; her general location, 300 to 400 somewhat to westward of the Prairie, was also known." (Italics ours.)

The language of this decision must be given special note, for a plain reading of the above excerpt clearly indicates that had the position of the scow not been known to the ferryboat for sometime, the scow would have been held solely at fault for failing to sound proper fog signals, even though the ferryboat was obviously traveling at an excessive rate of speed.

It is important to note that the sounding of improper fog signals is as gross a fault as the failure to sound fog signals at all. In *The Flemington,* 234 Fed. 864, a ferryboat, The Syracuse, was held at fault for failing to sound the regulation fog signals. The Court said:

> "We think the evidence shows that the Syracuse did not sound the regulation fog signals. *She did*

blow a series of short toots, but the law does not provide for such signals and the absence of the regulation long blast signals may well have confused and misled the master of the Flemington. Certainly the burden was on the Syracuse to show that the failure to blow the long blasts, as required by law, did not contribute to the injury. We do not see how we can say that this clear violation of the rules might not have caused or contributed to the collision. As was said by the Supreme Court in The Pennsylvania, 19 Wall. 125, at page 136, 22 L. Ed. 148:

> 'But when, as in this case, a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been. Such a rule is necessary to enforce obedience to the mandate of the statute.' "

See also:

The Old Colony, 52 F. 2d 992, 996.

In the face of the decisions hereinabove cited, it cannot be said that the appellees proved that the improper and inconsistent fog signals blown by the BEAR and her failure to blow the proper signals might not have been one of the causes of the collision. In any event there is certainly no evidence of any kind to indicate that the appellees have satisfied this burden and in fact a re-examination of the testimony offered by the appellees, which is referred to hereinabove, clearly demonstrates that the signals blown by the BEAR were a major factor in the occurrence of this collision.

II.

The District Court Erred When It Found:

"Sixth: (1) That at the time of the said collision the Bear was proceeding at a speed of about 1 to 1½ miles per hour.

"(7) That at the time of the said collision the Bear was virtually dead in the water.

"Eleventh: (3) That the Bear was not traveling at an excessive speed under all the circumstances."

The testimony of Mr. Korgan, one of the owners of the BEAR, was to the effect that the BEAR left the vicinity of Oceanside between 5:00 and 5:30 A. M. on the day of the collision [A. p. 102]. Mr. Milosevich testified that from Oceanside to San Pedro it was approximately 55 miles [A. p. 192]. Mr. Milosevich further testified that:

"We were supposed to be there maybe around 10 minutes before noon." [A. p. 206.]

Presuming that the collision took place approximately 2½ miles from San Pedro, this means that the BEAR was to negotiate about 52½ to 53 miles in a little bit more than six hours. To cover that distance, the BEAR would have to travel at its top speed of approximately eight to eight and a half knots; that the BEAR did travel at its top speed all the way and that it did not slow up when it hit the fog off Newport is substantiated by the following testimony of the crew of the BEAR.

Mr. Milosevich testified that the fog got dense and the visibility down to 50 to 60 feet when the BEAR was about

35 to 40 minutes to the jetty [A. p. 207]. At that point in his testimony, Mr. Milosevich was asked:

> "Q. Well, when you say 35 or 40 minutes to the jetty traveling at eight and one-half miles per hour? A. Going ahead.
>
> Q. Is that right? A. Yes. Not to the jetty. Don't you take me wrong. We slow down when we hit the fog." [A. p. 207.]

Upon examination by his own proctor, Mr. Milosevich said:

> "Q. When you picked out a point there and said that it was 35 or 40 minutes from that position to the jetty did you mean in clear weather or foggy weather? A. That was in foggy weather where we was there.
>
> Q. And the dense fog that you were talking about when the Marsha Ann hit you? A. Yes." [A. p. 241.]

Surely there can be no question that Mr. Milosevich expected to travel the distance between the point where he said the fog became dense and San Pedro in 35 to 40 minutes. How far was that distance? Again, according to the testimony of Mr. Milosevich, the answer was:

> "The Witness: Yes. We was right here about seven or eight miles off." [A. p. 206.]

The testimony of Mr. Milosevich is further substantiated by another member of the crew of the BEAR, Mr. Hoopes [A. pp. 147, 148].

If there remains any doubt as to the speed of the BEAR while it was traveling through the fog, this doubt is dispelled when we make further reference to the testimony of

Mr. Milosevich when he was being questioned by one of his own proctors:

> "We was going more ahead all the time. We was from the jetty about two and a half miles approximately, not quite three miles to the jetty. But I can recall that easy, because by that time 11:30, it takes about 20 more minutes to get there. We be there pretty near noon. I know exactly where we were holding course for her." [A. p. 241.]

If Mr. Milosevich expected to go two and a half miles in 20 minutes, the BEAR clearly was not traveling at one and a half miles per hour, rather it was moving at a speed of approximately seven and a half miles per hour. This latter speed, of course, is consistent with the testimony of the crew of the BEAR as hereinabove outlined and is in line with the various distances traveled by the BEAR between the points designated hereinabove.

From the above it can be readily seen that the speed of the BEAR was greatly in excess of moderate under the conditions prevailing at the time of the collision. The well established rule in this Circuit and indeed in all of the admiralty jurisdiction in the world is that a vessel shall not proceed in a fog at a speed at which she cannot be *stopped dead in the water in one-half the visibility before her.* (See *Silver Palm,* 94 F. 2d 754, 757, and the cases therein cited. See also *Union S. S. Co. of New Zealand, Ltd. v. Standard Oil Co. of California,* 60 Fed. Supp. 538, 539.)

The testimony of the crew of the BEAR was to the effect that the limit of visibility was approximately 50 feet [A. p. 137]; that the MARSHA ANN when first sighted was approximately 50 feet away [A. p. 137]; that at the speed at which the BEAR was traveling it would have taken the length of the BEAR to stop [A. p. 265-6]; that the overall

length of the BEAR was 65 feet [A. p. 103]. The BEAR could not have stopped in less than 65 feet but the stopping distance permitted the BEAR under the law hereinabove quoted was between 25 and 30 feet. It must be admitted that the speed of the BEAR was excessive and this excessive speed was a contributing cause of the collision for this reason. The point of impact was at the starboard beam of the BEAR or approximately 25 to 30 feet off of the foremost part of the BEAR. If the BEAR had been able to stop within its allotted stopping distance, to wit, 25 to 30 feet, instead of the distance equal to its length (65 feet) the collision would have been completely averted and the MARSHA ANN would have safely cleared the stem of the BEAR.

III.

The Court Erred When It Found:

"Ninth: (4) That the Bear was maintaining a proper and efficient lookout.

"Eleventh: (7) That the position of the lookout on the Bear on the open bridge was reasonable and proper under all the circumstances of the case.

"(8) That the position of the Bear's lookout did not contribute to the collision; that it would have happened regardless of where the lookout was stationed."

Too obvious for extended consideration is the fact that the first step toward avoiding danger is to be aware of it and consequently the sooner the danger is discovered the sooner precautions may be taken to avoid collision. Since a lookout is "the eyes and ears of the ship" (*The Saga-more*, 247 Fed. 243) upon whom the safety of a ship's forward movement depends, it is manifest that he be stationed

where his vision will be of the most benefit, not only to his ship but to other ships that his vessel might encounter. Where is that station? In *Eastern Dredging Co. v. Minnisimmet Co.,* 162 Fed. 860, 861, the Court said:

> "The Supreme Court has been constantly rigid in holding vessels to maintaining lookouts as far forward and as near the water as possible."

And in the *Manchioneal,* 243 Fed. 801, it was said:

> "By the overwhelming weight of authority it is settled that the proper place for a lookout is, under ordinary circumstances, on the bow."

The testimony of one of the owners of the BEAR indicates that he had designated no one to keep watch on the bow [A. p. 126]. This testimony is substantiated by that of one of the members of the crew [A. p. 158]. Mr. Bogdanovich said that he had come topside of his own will to act as a lookout [A. p. 285] and there was no positive evidence that he had been designated to act as a lookout or, if so, who had so instructed him. Mr. Hoopes testified that although he was topside he was:

> "A. Not exactly as a lookout, except to the interests of myself and the crew. While I was on deck I was looking out the same as anybody else." [A. p. 136.]

Surely, none of the above testimony can be stretched to indicate that the skipper had instructed any of the aforementioned persons to act as lookouts aboard the BEAR. Mr. Milosevich could not have been the lookout because he was at the wheel [A. p. 146]. As we already know, Mr. Miskulian was in charge of the whistle and was continually talking back and forth with Mr. Milosevich, who was

telling him when to blow the whistle [A. p. 214]. This leaves only Mr. Ancich, who was the cook aboard the BEAR. However, on the day in question he was in the pilothouse "close to the icebox" [A. p. 276].

Again it must be said that this man was not a properly designated lookout since it is clear that a lookout must be stationed in the bow and should not have any other duties as above shown.

In any event in case of fog the lookout should not be stationed in or near the pilothouse. See:

The Tillicum, 230 Fed. 415;
The Sagamore, 247 Fed. 743 and
Griffin on Collision, p. 272.

In the *Sagamore, supra,* the Court had occasion to consider the failure of the Sagamore to have a lookout stationed on the bow though it did have a lookout in the crow's nest. In rendering its decision, the Court said:

> "The denser the fog and the worse the weather the greater the cause for vigilance. A ship cannot be heard to say that a lookout was of no use because the weather was so thick that another ship could not be seen until actually in collision. *Marsden on Collision at Sea* (6th Ed.) 472, 474.
>
> "In the present case, we are of the opinion that while the stationing of a lookout in the crow's nest was a proper precaution, *yet this did not justify the withdrawal of the lookout or lookouts from the ordinary station on the bow.* Great difficulty in seeing does not justify abandonment of efforts to see, but, on the contrary, requires the stationing of men 'to see if they can see'." (Italics ours.)

The following language was used by the Circuit Court of Appeals of the Ninth Circuit when it affirmed the decree of the District Court which held that the tug *Tillicum* was at fault for having its lookout stationed in the pilothouse in a dense fog.

> "Had the tug had a proper lookout, properly placed, no one can say whether, even with the bad navigation of the Rosalie, the latter might not have been seen or her whistles heard by the Tillicum, and the collision avoided. It appears that the master and pilot of the tug was navigating her at the time, *and that her lookout, Capt. Charlesworth, was in the pilot house with him,* where not only the opportunity of seeing and hearing was lessened, but where the attention of both lookout and pilot was liable to be, and may have been, distracted by conversation."

Clearly, the principles above set forth are well established as the cited cases prove and as applied to the facts of the instant case we cannot escape the conclusion that the BEAR was at fault in having its lookouts, if such they can be so-called, on the pilot deck instead of on the bow, which was at least 25 to 30 feet forward of the pilothouse. The undisputed testimony of the crew of the BEAR shows that visibility was 50-60 feet, yet 30 feet of that visibility was wasted by the BEAR on the area between the pilot deck and the bow. In brief, by stationing its lookouts on the pilot deck the BEAR reduced the visibility by 25 to 30 feet. Granted this added visibility, would the danger of collision not have been markedly reduced? Surely, this question must be answered in the affirmative.

Further it must be concluded that the BEAR *was at fault in failing to have a lookout who had no other duties.* The rigidity with which this rule is enforced by the courts is evidenced by the following excerpt from *Griffin on Collision,* pages 277, 278:

> "The importance of unbroken vigilance on the part of the lookout is so great that, on vessels of any size, the rule is definite that the lookout must be no other duty.
>
> "The lookout should 'have no other duties to perform' (*Chamberlain v. Ward,* 21 How. (62 U. S.) 548, 571 (1859); *The Colorado,* 91 U. S. 692, 698 (1876)). So a deckhand who has other duties, is not a proper lookout (*the Pavonia,* 26 Fed. 106 (1885)); *Brooklyn Ferry Co. v. U. S.,* 122 Fed. 696 (1903); *the Supply No. 4,* C. C. A. 2, 109 F. 2d 101, 1940 A. M. C. 188; nor is the helmsman (*the Pilot Boy,* C. C. A. 4, 115 Fed. 876 (1902)); nor a sailor who also has charge of the navigation and of sounding the foghorn (*the Energy,* 42 Fed. 301 (1890); *cf. the Nacoochee,* 137 U. S. 330 (1899)). The navigating officer is not a sufficient lookout (*Larsen v. the Myrtle,* 44 Fed. 779 (1890); *the W. H. Beaman,* 45 Fed. 125 (1891); *the J.G. Gilchrist,* C. C. A. 2, 183 Fed. 105 (1910))."

IV.

The Trial Court Erred When It Found:

> "Eleventh: (6) That under the circumstances of this case, Article 19 of the International Rules does not apply."

The appellees testified that the MARSHA ANN was under way and was traveling from two to six miles per hour when sighted by the BEAR [A. pp. 139, 176]. If this testimony be accepted, then it must be held that the vessels were on crossing courses and it was the duty of the BEAR, as the burdened vessel, to keep out of the way of the MARSHA ANN.

33 U. S. C. A., Section 104 (Art. 19) provides as follows:

> "When two steam vessels are crossing so as to involve the risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other."

The Trial Court held that this rule did not apply. It is the contention of the appellants that the Court erred when it so finds for the following reasons:

In the *Peshtigo,* 25 Fed. 488, 490, the Boscobel had the Tempest on her starboard side and even though a dense fog was prevailing the Court held that the Boscobel was at fault in failing to keep out of the way of the Tempest. To the same effect are the following cases which applied the starboard hand rule and in each instance the collision occurred in a dense fog:

Watts v. United States, 123 Fed. 105, 113;

The Phoenix, 58 Fed. 927, 928;

The City of Alexandria, 31 Fed. 427.

That the reasoning of the above cases is sound is apparent for the following reasons: Presume that two vessels are on crossing courses and when both are a given distance from the point where their courses would intersect they become aware of each other and come to a stop. What happens? Unless there is a uniform rule to follow whereby one vessel gives way to the other, neither vessel could safely move on its course again without danger. Quite obviously, therefore, the starboard hand rule must be applied even in fog, especially when, as in the instant case, the burdened vessel sighted the privileged vessel at least ten seconds before the collision according to the testimony of the crew of the BEAR and therefore had the opportunity to keep out of the way of the MARSHA ANN. This fact becomes even more evident when it is considered that the further testimony of the crew of the BEAR was to the effect that it would take the BEAR only 4-5 seconds for its engines to take hold in reverse [A. p. 182].

V.

The Court Erred When It Found:

"Eleventh: (4) That the Bear was stopping her engines and navigating with caution.

"Sixth: (3) That the Bear alternately stopped and proceeded with caution at a speed of approximately 1½ miles per hour upon hearing whistles in the vicinity."

33 U. S. C. A., Section 92, provides as follows:

"A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines, and then

navigate with caution until danger of collision is over."

In *The Silver Palm,* 94 F. 2d 754, the Circuit Court of Appeals of the Ninth Circuit was called upon to consider the application of the above rule and in its opinion it said:

"Probably the most imperative mandate of the International Rules is contained in article 16, requiring a vessel to stop her engines at once upon hearing a vessel in the fog forward of her beam."

And at page 761:

"No command is more imperative on a steam vessel proceeding in the fog than that instanter on her hearing the whistle of a concealed vessel forward of her beam the engines shall be stopped. As with the blowing of two whistles in violation of the rule, the regulation places upon the violator the severest burden of proof in collision cases. In the case of the Beaver-Selja collision this court condemned a vessel proceeding in a fog, *where the violation of the rule occurred 20 minutes* before the collision. The violator was condemned, although the opposing vessel admitted liability for maintaining, in a dense fog, a speed in excess of that claimed against the Silver Palm. The Beaver (C. C. A. 9) 219 Fed. 134, 137.

"The Supreme Court in affirming held, concerning violations of the stop engines of article 16, that: 'The most cursory reader of this rule must see that while the first paragraph of it gives to the navigator, discretion as to what shall be "moderate speed" in a fog, the command of the second paragraph is imperative that he shall stop his engines when the conditions described confront him. The difficulty of locating the direction or source from which sounds proceed in a fog renders it not necessary to dwell upon the pur-

pose and obvious wisdom of this second paragraph of the rule'; and the rule as to the burden of proof to be: ' "Not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been." ' *Lie v. San Francisco & Portland S. S. Co.,* 243 U. S. 291, 296, 298, 37 S. Ct. 270, 272, 61 L. Ed. 726."

In the case at bar there is absolutely no question but that the required fog signals were being given by the MARSHA ANN [A. p. 378] and that she was forward of the beam of the BEAR immediately prior to the collision when the said signals were being sounded. The physical facts relative to the point of impact and the conformation of the wound in the BEAR indicated conclusively that the MARSHA ANN could not have been aft of the beam of the BEAR immediately prior to the impact. To prove this we need only review the testimony of the crew of the BEAR. It was to the effect that the BEAR was traveling about one and a half miles per hour [A. p. 149] and from the time she first sighted the MARSHA ANN until the time of the impact she had moved forward from eight to ten feet [A. p. 139]. If the BEAR had been traveling at a speed of one and a half miles per hour, it would move 2.2 feet per second. The crew of the BEAR further testified that from the time the MARSHA ANN was first sighted to the time of the collision about ten seconds elapsed [A. p. 151]. If only ten seconds elapsed and if, as contended by the appellees, the BEAR was traveling one and a half miles per hour, the BEAR moved approximately 22 feet from the time she first sighted the MARSHA ANN and the time of the collision. We see,

therefore, that from the testimony of the BEAR's own crew it traveled more than ten feet in the interim between the time the MARSHA ANN was sighted and the time of collision. If the testimony of the BEAR's crew is to be accepted as true, the point of impact would have been considerably aft of the beam and much closer to the stern. It must therefore be concluded that when the MARSHA ANN was first sighted she was not bearing on the green light of the BEAR but was well forward of the green light and indeed was well forward of the bow of the BEAR.

From the above it can be seen that it was the duty of the BEAR to stop immediately upon hearing the fog signals of the MARSHA ANN forward of her beam and the BEAR was at fault in failing so to do. If the BEAR had stopped her engines upon hearing the said signals and if the MARSHA ANN was traveling at the rate of speed claimed by the appellees, the MARSHA ANN would have passed the point of collision and the collision would not have occurred.

In the celebrated case of *The Beaver,* 219 Fed. 134, already quoted from in the excerpt from the *Silver Palm, supra,* the Court was faced with a very similar problem and said:

> "Had the master of the Selja stopped her engines when he first heard the whistle of the Beaver, practically right ahead, as he himself testified, or at almost any time thereafter during the ten or more minutes that the Beaver was sounding her whistle every 35 seconds, manifestly the collision *could not have occurred.* for at the rapid and unlawful speed at which the Beaver was going she would necessarily have passed the point of collision."

VI.

The Court Erred in Ordering, Adjudging and Decreeing:

"That intervening libelants George Korgan and Sam Bilas do have and recover from the Oil Screw Marsha Ann, and from Jack Borcich, Andrew Vilicich and Bortul Zankich, in respect of the damages to the Bear, the sum of $14,678.61, together with interest from November 30, 1948, at 7% per annum on the amount of $14,170.67 until paid.

"That intervening libelants George Korgan and Sam Bilas do have and recover from the Oil Screw Marsha Ann and from Jack Borcich, Andrew Vilicich and Bortul Zankich in respect of the loss of use of the Bear the sum of $4,320.00, together with interest thereon at 7% per annum from November 30, 1948, until paid.

"That libelants and intervening libelants do have and recover from the Oil Screw Marsha Ann and from Jack Borcich, Andrew Vilicich and Bortul Zankich, their costs of suit herein incurred.

"Twelfth: The District Court erred when it found:

"(2) That the period of 38 days was a reasonable lay-up time for bids and repairs to the Bear."

It has already been shown in the statement of the case above that the BEAR was an old wooden vessel built in about 1917 [A. p. 125]. Mr. Williams, the marine surveyor of about 35 years' experience, whose reputation was readily admitted by the proctors for the appellees, testified

that a great portion of the BEAR was rotten [A. pp. 448, 451]. He was substantiated in this testimony by Mr. DeFever [A. p. 539]. This testimony was in no way refuted by the surveyor of the appellees. In fact he said that he did not know whether certain portions of the BEAR were rotten or not [A. p. 338]. In any event it is clear from an objective review of all of the evidence presented that having been exposed to the elements for more than thirty years on the seas the BEAR was clearly not in good condition prior to the collision.

It was shown that when repairs were made to the BEAR they were not confined to those necessitated by the collision. For example, approximately 44 ribs were put in the starboard side of the vessel when in fact only 12 or 14 were necessary [A. p. 490]. The amount of money necessary to put in these added ribs was sizable when it is realized that the cost of installing each rib is $40.00 [A. p. 457]. It was also shown that it was much cheaper to plug the frames than it was to put in sister frames [A. pp. 477, 478].

The frames on the port side [A. p. 537], the bilge area [A. p. 453] and many other old breaks [A. pp. 488, 489] were repaired and the charge assessed to this collision when it was clear from the testimony and from photos introduced in evidence that the breaks in these respective areas were old as indicated by the dirt and debris adhering to the broken portions [A. pp. 453, 488-9]. When the cost of these unnecessary repairs are totaled and deducted from the amount awarded by the Court for damages to the BEAR, it is clear that the true amount of damages is closer to the figure estimated by Mr. DeFever, to wit, $5900.00 [A. p. 539], and in any event not in excess of the $6500.00 estimated by Mr. Williams [A. p. 456].

The Court awarded the owners of the BEAR $4,320.00 for damages in respect to loss of use of the BEAR for a period of 38 days [A. p. 65]. Since, as it has already been shown above, many of the repairs made to the BEAR were not required by the collision, it follows that the time necessary for these repairs should not be 38 days but much closer to 20 to 25 days as properly estimated by Mr. DeFever [A. p. 540].

Briefly, it is the position of the appellants that, at best, an owner is entitled to the cost of the repairs of the damage proximately caused by the collision. Clearly he is not entitled to "make over" an aged vessel and thereby profit by the misfortune of another.

VII.

The Court Erred When It Found:

"Sixth: (5) That the speed of the Marsha Ann at the time of sighting the Bear was immoderate and unwarranted under the circumstances and constituted negligence.

"(6) That before any steps could be taken to avert or minimize the collision, the Marsha Ann struck the Bear at almost a right angle on the starboard side of the Bear just abaft the deck house.

"Seventh: That District Court erred when it found that at no time prior to the impact did the Marsha Ann take any steps to avoid the collision by reversing her engines, or coming to a complete stop.

"Eighth: The District Court erred when it found:

"(1) That the Marsha Ann was negligent or committed any faults which were the direct and sole cause of the collision and of the alleged damage.

"(2) That the Marsha Ann was moving at an excessive speed at the time of the said collision.

"Sixth: (4) That while so navigating the Marsha Ann appeared from out of the fog broad on the starboard beam of the Bear at a distance of about 40 feet.

"Ninth: (5) That the Bear was observing all of the rules and regulations applicable to a vessel in her situation.

"Tenth: The Bear was not negligent or at fault in any respect contributing to the collision.

"Third: The District Court erred when it did not conclude that the Oil Screw Bear was solely at fault in the said collision."

It was the testimony of the appellees that the MARSHA ANN was traveling from two to six miles per hour [A. p. 139] at the time of the collision. In evaluating the testimony relative to the speed of the MARSHA ANN, the Court arrived at the following conclusion, which it stated rather tersely as follows at the end of the trial:

> "I believed the witnesses when they said that the motors, the engines of the MARSHA ANN were not going at the time of the collision. I came to that conclusion." [A. p. 572.]

The Court did not make any comment as to the length of time the engines of the MARSHA ANN were stopped. However, since there was no evidence to the contrary, the testimony of the appellants must be accepted, which is to the effect that the engines were so stopped approximately 5 minutes [A. p. 362]. If this be true, then the MARSHA ANN was virtually still in the water and it could not be said that she was speeding. This conclusion is further substantiated by the fact that if the MARSHA ANN, which weighed approximately 360 to 370 tons at the time of the collision [A. pp. 374-5] and had a 3x3 stem iron, was speeding it would have broken the steel band which served as a guard on the BEAR and would have virtually severed the BEAR in half. Surely, it will be admitted that the guard rail above mentioned was bent. However, an examination of the photographs introduced in evidence shows that it was not broken through. It is absolutely inconceivable that a vessel as large and as heavy as the MARSHA ANN would not have completely shorn the said iron band and caused a resultant pie-shaped wound in the hull and superstructure of the BEAR if she was struck with the force claimed.

An examination of the conformation of the wound in the rail on the starboard side of the BEAR shows rather conclusively that the blow, which it received, was not struck at a direct or even approximate 90-degree angle. Had the blow been a straight blow, the wound would have been pie-shaped. Further examination of the photographs of the wound show that they support the contention of the appellees that the BEAR was crossing the bow of the MARSHA ANN at an angle of about 45 degrees and it was close

to the bow of the MARSHA ANN. The skipper made a turn hard to port, thereby swinging the BEAR into the stem of the MARSHA ANN. The BEAR completed its hard to port turn and then reversed its engines and came alongside of the MARSHA ANN. This is substantiated by the testimony of one of the crew members of the BEAR, who testified that after the impact the boat (MARSHA ANN) was portside to the BEAR [A. p. 153], and that the bow of the BEAR was ahead of the bow of the MARSHA ANN [A. p. 153]. If further support for this contention of the appellants is necessary, we may find it in the testimony of Mr. Zankich, the chief radar operator of the MARSHA ANN, who said he thought "somebody had hit us in the side." [A. p. 444.] This testimony is consistent with the fact that the BEAR had swung her starboard side into the bow of the MARSHA ANN at an angle of considerably less than 90 degrees and on the port side of the bow of the MARSHA ANN. Had the blow been a direct blow as indicated by the appellees, Mr. Zankich would have no cause to believe that the impact was on the side of the MARSHA ANN.

Since there is no dispute about the fact that the MARSHA ANN was sounding the proper fog signals at the time of the collision [A. pp. 378, 426, 427] and since there is no dispute that the MARSHA ANN sounded the correct danger signal [A. pp. 380, 430], it is submitted that the MARSHA ANN clearly committed no fault in the premises.

VIII.

The District Court Erred When It Ordered, Adjudged and Decreed:

"That the following libelants, as crew members of the Bear, do have and recover from the Oil Screw MARSHA ANN and from Jack Borcich, Andrew Vilicich and Bortul Zankich, the amount set down opposite their respective names, together with interest thereon from November 30, 1948, at 7% per annum until paid, to wit:

John Ancich	$918.00
John Kaiza	918.00
Anton Bogdanovich	918.00
Peter Svorinich	918.00
Martin Miskulin	918.00
Ray Zukowski	918.00
William T. Decker	918.00
George Korgan	918.00
W. H. Hoopes	418.00
Nick Milosevich	918.00

"The District Court erred when it found:

"Fourth: That the allegations of Article I of the Ancich libel are true."

The original libel in this case was filed by seven of the crew of the BEAR for damages and maintenance. The essence of this libel was for recovery of the crew's share of the expected but unrealized income from future fishing trips of the BEAR [A. p. 3]. Subsequently an intervening libel was filed by the remainder of the crew for recovery of like damages [A. p. 35]. At the time of trial the appellants objected to the introduction of any evidence on

behalf of the said fishermen on the ground that said libel and intervening libel failed to state a cause of action upon which relief could be granted [A. pp. 98, 99]. On July 18, 1950, the Court ordered *nunc pro tunc* May 31, 1950, that said objection be overruled.

None of the fishermen makes claim for the loss of earning capacity resulting from any personal injury. No such claim could have been made for the only physical injury arising out of the collision in question was to the BEAR herself. The fishermen's claim for damages is that by reason of the collision and detention of the BEAR the fishermen lost the opportunity to fish upon her and therefore participate in a percentage of the income resulting from the catches.

The fishermen are therefore in effect claiming for loss of use or detention. However, such a ground attaches to the *ownership* of a vessel which has suffered damage. See *Potomac,* 105 U. S. 630, 26 L. Ed. 1194 (1881), but it is only the owner's loss of this that is recoverable, *Agwidale v. San Veronico,* 153 F. 2d 869, 1946 A. M. C. 142 (C. C. A. 2d). The fishermen had and claimed no property or interest in the BEAR [A. p. 101] and cannot recover for loss of use or detention.

Any damages suffered by the said fishermen could arise solely by reason of their contract of employment with the owners of the BEAR to fish on the future voyages of the BEAR. Phrased otherwise, any damages suffered by the fishermen were by reason of loss from failure to make future fishing trips on the BEAR during the term of their respective contracts.

At the pre-trial hearing the Trial Court requested the appellants to formulate the question presented by the libel

of the fishermen and at that time the question was formulated substantially as follows:

> "Can the fishermen sue for the benefit of a contract with their shipowner which cannot be carried out because of the negligence of a third party who collided with the shipowner's vessel?"

The law, however, does not afford to these fishermen any remedy against these appellants. The damages claimed are too remote and they cannot be said to have proximately been caused by any act of these appellants. The answer to the above question, therefore, is that the fishermen do not have a cause of action against these appellants. See:

Robbins Dry Dock and Repair Co. v. Flint, 275 U. S. 303, 48 S. Ct. 135, 72 L. Ed. 290 (1927);

Remorquage v. Bennetts, 1 K. B. 243;

The Federal No. 2, 21 F. 2d 313.

It is to be noted that some of the above mentioned cases are admiralty cases and others are common law cases, but in the above instance the rule is the same, to wit: A third person, who by his fault interferes with the performance of a contract or with the expectation of obtaining a contract, cannot be held liable to one of the contracting parties in the absence of malice or intent. See:

Robbins Dry Dock and Repair Co. v. Flint, supra.

In that case the propeller of a vessel under time charter was injured and the vessel delayed through the neglect of the operators of the dry dock. The charterer sued the dry dock for loss of use, and, in the lower courts, recovered. That result was reversed in the Supreme Court and all re-

covery denied. Mr. Justice Holmes said at pages 308-309 of that decision:

> "The injury to the propeller was no wrong to the respondents (the charterer) but only to those to whom it belonged. But suppose that the respondent's loss flowed directly from that source. Their loss arose only through their contract with the owners—and while intentionally to bring about a breach of contract may give rise to a cause of action, *Angle v. Chicago, St. Paul, Minneapolis & Omaha Ry. Co.,* 151 U. S. 1, no authority need be cited to show that, as a general rule, at least, a tort to the person or property of one man does not make the tort feasor liable to another merely because the injured person was under a contract with that other, unknown to the doer of the wrong. See *Savings Bank v. Ward,* 100 U. S. 195. The law does not spread its protection so far. A good statement applicable here, will be found in *Elliott Steam Tug Co., Ltd. v. Shipping Controller* (1922), 1 K. B. 127, 139, 140; *Byrd v. English,* 117 Ga. 191; The Federal No. 2 (The Glooscap) 1927 A. M. C. 1471, 21 F. (2d) 313."

To the same effect see:

> *Agwilines Inc. v. Eagle Oil and Shipping Co.* (Agwidale-San Veronico), 153 F. 2d 869, 1946, A. M. C. 142 (C. C. A. 2d) cert. denied 328 U. S. 835.

In the *Robbins Dry Dock* case Mr. Justice Holmes referred to the following in *Elliott Steam Tug Co. v. Shipping Controller* (1922), K. B. 127, as being "a good statement."

Scrutton L. J. at pp. 139-140.

"In case of a wrong done to a chattel the common law does not recognize a person whose only rights are a contractual right to have the use or services of the chattel for purposes of making profits or gains without possession of or property in the chattel. Such a person can not claim for injury done to his contractual rights. . . . The charterer in collision cases does not recover profits, not because the loss of profits during repairs is not the direct consequence of the wrong, but because the common law, rightly or wrongly, does not recognize him as able to sue for such an injury to his merely contractual rights."

This is not a case like *U. S. v. Laflin* (The Lydia), 24 F. 2d 683 (1928 A. M. C. 700), where an act of Congress included the crew among the possible claimants for damages for seals uncaught on a voyage intentionally and wrongfully interrupted by United States officers, in which case the *owner* was allowed to include the crew's interest with his own recovery under that statute.

This is not a case like *Van Camp Sea Food Company v. DiLeva,* 171 F. 2d 454 (1949 A. M. C. 319), 9th Circuit (1948), where the members of a crew recovered *from their employer* for loss of contract earnings due to layup of their vessel resulting from a collision through the negligent operation of another vessel owned and operated *by the same employer.* However, it was there observed by the Court that an action by the crew could not have been maintained had the offending vessel been owned by "some third party." In its opinion at page 455 the Court said:

"More particularly (appellant's) contention is that if the GLORIA R had been owned by some third party, the appellant, as owner of the Bessemer, would have had the *sole right* to sue the GLORIA R's owner for the

> GLORIA R's wrong doing. This latter contention respecting separately owned vessels is the law of this circuit and generally of the admiralty as stated by this court in a case relied upon by appellant, *United States v. Laflin,* 9 Cir., 24 F. 2d 683, reported also as The LYDIA, 1928 A. M. C. 700, and cases therein cited." (Emphasis added.)

Surely there is great reason for holding of the *Robbins* case and other related cases which preclude a cause of action in a case such as this against the negligent tortfeasor. Firstly, a tortfeasor must be held to the damages proximately caused by his act; that is, damages which are reasonably foreseeable. Charged by this standard it cannot be said, and the courts do not so hold, that a tortfeasor must foresee that all persons whose property he may injure have a contract of employment with other persons and that these other persons will be deprived of this contract right. Secondly, to permit recovery against such a tortfeasor would open the door to all sorts of chicanery and fraud between the party whose property was damaged and the claiming parties who could quite easily and simply fabricate the contract right between them.

To further illustrate that the position of the libelants is untenable, let us suppose that one of the huge Matson liners was damaged by a negligent tortfeasor. Can it be seriously contended that each of the seamen or other employees aboard that vessel could maintain a cause of action against the said negligent tortfeasor for future wages which would accrue under their respective contracts of employment? The answer must be in the negative and the libelants have not been able to cite a case to the contrary.

The issues raised by the libel of the fishermen in no way involve the question whether or not the *owners* of the BEAR might have recovered against any or all of these appellants, or if so whether the owners might have recovered not only for their own loss of use as owners, but also for any loss of wages or the like suffered by the fishermen. In any event, it cannot be too forcefully stressed that a right in the master or owner of the injured vessel to sue for prospective catches *does not* give the fishermen an equal and co-existing right to sue for such catches. Any cause of action which the fishermen have must *be theirs by virtue of their own right and not by virtue of the right which exists in the owner.* The attention of the Court is called to the following language on page 309 of *Robbins Dry Dock & Repair Co. v. Flint, supra:*

> "The decision of the Circuit Court of Appeals seems to have been influenced by the consideration that if the whole loss occasioned by keeping a vessel out of use were recovered and divided a part would go to the respondents. It seems to have been thought that perhaps the whole might have been recovered by the owners, that in the event the owners would have been trustees for the respondents to the extent of the respondents' share, and that no injustice would be done to allow the respondents to recover their share by direct suit. *But justice does not* permit that the petitioner be charged with the full value of the loss of use unless there is some one who has a claim to it *as against* the petitioner. *The respondents have no claim either in contract or in tort, and they cannot get a*

standing by the suggestion that if some one else had recovered it he would have been bound to pay over a part by reason of his personal relations with the respondents."

From the foregoing together with the cases and authorities cited herein, it is clear that the fishermen have no cause of action against these appellants under the law as it now exists. To hold otherwise would be to legislate into existence such a broad concept of liability for negligent acts that the present rule permitting the recovery from a negligent tortfeasor of damages which proximately result from his tortious acts, would be completely abrogated and a negligent tortfeasor would be liable for *all* damages resulting from his negligent act whether the said damages were proximate or remote.

Attention is further directed to the fact that the trial court awarded damages to libelants Ray Zukowski and William T. Decker although no evidence whatsoever was introduced for or on behalf of either of these libelants proving or even tending to prove that they were damaged in any manner whatsoever. The said libelants did not appear to testify for themselves and there was no other competent evidence to support the allegations of their respective libels which were denied by these appellants. It is clear, therefore, that the Court gratuitously undertook to render a judgment for damages in favor of these libelants without the benefit of any evidence to support such a judgment.

Conclusion.

In view of the foregoing, appellants contend that the MARSHA ANN was not at fault in the premises. However, regardless of the propriety of the navigation of the MARSHA ANN, it is submitted that the flagrant faults committed by the BEAR point unerringly to the conclusion that these faults. if not the sole cause of said collision, certainly contributed to the happening of this collision and the owners of the BEAR should be held mutually liable for the damages arising therefrom.

Furthermore it is the contention of appellants that the libel of the fishermen appellees failed to state facts sufficient to constitute a claim against these appellants.

For the reasons hereinabove stated, it is respectfully submitted that the Trial Court erred in the various particulars herein outlined and for said reasons the judgment should be reversed.

Respectfully submitted,

TRIPP & CALLAWAY,
By HULEN C. CALLAWAY,
Attorneys for Appellants.

APPENDIX.

Assignments of Errors Relied Upon by Appellants.

"First: The District Court erred when it ordered, adjudged and decreed:

"That the following libelants, as crew members of the Bear, do have and recover from the Oil Screw MARSHA ANN and from Jack Borcich, Andrew Vilicich and Bortul Zankich, the amount set down opposite their respective names, together with interest thereon from November 30, 1948, at 7% per annum until paid, to wit:

John Ancich	$918.00
John Kaiza	918.00
Anton Bogdonovich	918.00
Peter Svorinich	918.00
Martin Miskulin	918.00
Ray Zukowski	918.00
William T. Decker	918.00
George Korgan	918.00
W. H. Hoopes	418.00
Nick Milosevich	918.00

"That intervening libelants George Korgan and Sam Bilas do have and recover from the Oil Screw Marsha Ann, and from Jack Borcich, Andrew Vilicich and Bortul Zankich, in respect of the damages to the Bear, the sum of $14,678.61, together with interest from November 30, 1948, at 7% per annum on the amount of $14,170.67 until paid.

"That intervening libelants George Korgan and Sam Bilas do have and recover from the Oil Screw Marsha Ann and from Jack Borcich, Andrew Vilicich and Bortul Zankich in respect of the loss of use of the Bear the sum

of $4,320.00, together with interest thereon at 7% per annum from November 30, 1948, until paid.

"That libelants and intervening libelants do have and recover from the Oil Screw Marsha Ann and from Jack Borcich, Andrew Vilicich and Bortul Zankich, their costs of suit herein incurred.

"Third: The District Court erred when it did not conclude that the Oil Screw Bear was solely at fault in the said collision.

"Fourth: The District Court erred when it found that the allegations of Article I of the Ancich libel are true.

"Sixth: The District Court erred when it found:

"(1) That at the time of the said collision the Bear was proceedng at a speed of about 1 to 1½ miles per hour.

"(2) That at the time of the said collision and for more than an hour preceding the same the Bear was sounding fog signals in compliance with the applicable Rules of the Road.

"(3) That the Bear alternately stopped and proceeded with caution at a speed of approximately 1½ miles per hour upon hearing whistles in the vicinity.

"(4) That while so navigating the Marsha Ann appeared from out of the fog broad on the starboard beam of the Bear at a distance of about 40 feet.

"(5) That the speed of the Marsha Ann at the time of sighting the Bear was immoderate and unwarranted under the circumstances and constituted negligence.

"(6) That before any steps could be taken to avert or minimize the collision, the Marsha Ann struck the Bear at

almost a right angle on the starboard side of the Bear just abaft the deck house.

"(7) That at the time of the said collision the Bear was virtually dead in the water.

"Seventh: That District Court erred when it found that at no time prior to the impact did the Marsha Ann take any steps to avoid the collision by reversing her engines, or coming to a complete stop.

"Eighth: The District Court erred when it found:

"(1) That the Marsha Ann was negligent or committed any faults which were the direct and sole cause of the collision and of the alleged damage.

"(2) That the Marsha Ann was moving at an excessive speed at the time of the said collision.

"Ninth: The District Court erred when it found:

"(2) That the Bear was manned by a competent crew.

"(3) That the Bear was well and carefully navigated.

"(4) That the Bear was maintaining a proper and efficient lookout.

"(5) That the Bear was observing all of the rules and regulations applicable to a vessel in her situation.

"Tenth: The District Court erred when it found that the Bear was not negligent or at fault in any respect contributing to the collision.

"Eleventh: The District Court erred when it found:

"(3) That the Bear was not traveling at an excessive speed under all the circumstances.

"(4) That the Bear was stopping her engines and navigating with caution.

"(6) That under the circumstances of this case, Article 19 of the International Rules does not apply.

"(7) That the position of the lookout on the Bear on the open bridge was reasonable and proper under all the circumstances of the case.

"(8) That the position of the Bear's lookout did not contribute to the collision; that it would have happened regardless of where the lookout was stationed.

"Twelfth: The District Court erred when it found:

"(2) That the period of 38 days was a reasonable lay-up time for bids and repairs to the Bear."